

I & M Kosher Catering LLC v BHNG Inc.

2024 NY Slip Op 31889(U)

May 30, 2024

Supreme Court, Kings County

Docket Number: Index No. 523834/2019

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

-----X
I & M KOSHER CATERING LLC,

Plaintiff, Decision and order

- against -

Index No. 523834/19

BHNG INC. and KARIEN GANAH a/k/a KARIEN
NADAV,

Defendants, May 30, 2024

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #3

The defendants have moved pursuant to CPLR 3212 seeking summary judgement dismissing the lawsuit. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in prior orders on September 24, 2018 the parties entered into an agreement whereby the plaintiff purchased a bagel store from the defendants located at 1755 Coney Island Avenue in Kings County. The purchase price was \$800,000. According to the complaint the defendants represented an annual net profit of \$250,000 and that representation induced the plaintiff to purchase the store. The complaint asserts the defendants fraudulently misrepresented the net profits of the store and thus fraudulently induced the plaintiff to enter into the agreement. The defendants have now moved seeking summary judgement arguing there are no questions of fact that claim must be dismissed because the agreement between the parties specifically states the plaintiff did not rely upon any representations of the

defendants. As noted the plaintiff opposes the motion.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]).

To support a claim for fraudulent misrepresentation the plaintiff must establish a misrepresentation of fact that was false when made for the purpose of inducing another to rely upon it and they justifiably relied upon it to their detriment (Mandarin Trading Ltd., v. Wildenstein, 16 NY3d 173, 919 NYS2d 465 [2011]). Therefore, misrepresentations made before the formation of a contract which induce a party to enter into the contract can support claims for fraudulent misrepresentation (Cohen v. Koenig, 25 F3d 1168 [2d Cir. 1994]). The misrepresentation must concern a present fact, not a future promise (see, Scialdone v. Stepping Stones Associates L.P., 148 AD3d 953, 50 NYS2d 413 [2d Dept., 2017]).

Originally, in New York, no-reliance clauses were not

enforced. As the court of Appeals held in Bridger v. Goldsmith, 98 Sickles 424, 143 NYS 424 [1984] "there is no authority that we are required to follow in support of the proposition that a party who has perpetrated a fraud upon his neighbor may nevertheless contract with him, in the very instrument by means of which it was perpetrated, for immunity against its consequences, close his mouth from complaining of it, and bind him never to seek redress. Public policy and morality are both ignored if such an agreement can be given effect in a court of justice. The maxim that fraud vitiates every transaction would no longer be the rule, but the exception. It could be applied then only in such case as the guilty party neglected to protect himself from his fraud by means of such a stipulation. Such a principle would in a short time break down every barrier which the law has erected against fraudulent dealing" (id). Notably, in some jurisdictions, this remains the law. In Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Development Corp., 32 CalApp4th 985, 38 CalRptr2d 783 [Court of Appeal, First District, Division 2, California 1995] the court explained that a "party to a contract who has been guilty of fraud in its inducement cannot absolve himself [or herself] from the effects of his [or her] fraud by any stipulation in the contract, either that no representations have been made, or that any right which might be grounded upon them is waived" (id, see, also, First National Bank of Louisville v. Brooks Farms, 821 SW2d

925 [Supreme Court of Tennessee at Nashville, 1991, Ong International (U.S.A.) Inc. v. 11th Ave. Corp., 850 P2d 447 [Supreme Court of Utah 1993]).

However, in Dannan Realty Corp., v. Harris, 5 NY2d 317, 184 NYS2d 599 [1959] the New York Court of Appeals essentially changed direction and held that a disclaimer regarding reliance will preclude a claim fraudulent misrepresentation if the disclaimer is sufficiently specific as to the particular facts that are the subject of the disclaimer and that the alleged misrepresentation did not concern facts within the knowledge of the party making the misrepresentation (see, Basis Yield Alpha Fund (Master) v. Goldman Sachs Group Inc., 115 AD3d 128, 980 NYS2d 21 [1st Dept., 2014]). Thus, "only where a written contract contains a specific disclaimer of responsibility for extraneous representations, that is, a provision that the parties are not bound by or relying upon representations or omissions as to the specific matter, is a plaintiff precluded from later claiming fraud on the ground of a prior misrepresentation as to the specific matter" (id). Thus, in DiFilippo v. Hidden Pond Associates, 146 AD2d 737, 537 NYS2d 222 [2d Dept., 1989] the court held that claims of fraudulent misrepresentation were not barred where the provision did not "specifically disclaim reliance on any oral representation concerning the particular matter as to which plaintiff now claims he was defrauded" and

that such provision did not foreclose the plaintiff "from offering evidence of the defendants' oral representations to the contrary" (id). Again, in GTE Automatic Electric Inc., 127 AD2d 545, 512 NYS2d 107 [1st Dept., 1987] the court held claims of fraudulent misrepresentation were not barred where any guaranty lacked a specific disclaimer. Further, in Goodridge v. Fernandez, 121 AD2d 942, 505 NYS2d 144 [1st Dept., 1986] the court held claims of fraudulent misrepresentation were permitted where the guaranty did not contain specific disclaimers.

An examination of the no-reliance clauses in the agreement in this case reveal that no such disclaimer regarding revenue earned was ever negotiated and thus the no-reliance clause is not specific to the matter of the alleged misrepresentation. Article 4G of the Asset Purchase Agreement states that "except as otherwise expressly set forth herein, Seller has not made and Purchaser has not relied on any representations or warranties with respect to the Assets and/or the Sublease hereunder" (id). This clause only concerns the assets and any subleases. Clearly, it does not involve the specific representations concerning the revenue earned. Further, Article 10.1 of the agreement states that "all representations, warranties and covenants contained in this Agreement shall be deemed continuing representations, warranties and covenants, and shall survive the execution of this Agreement for a period of six (6) months from the Closing Date.

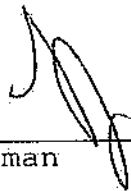
Any investigations by or on behalf of any party hereto shall not constitute a waiver as to enforcement of any representation, warranty or covenant contained herein" (id). Again, this provision is limited to representations contained "in this agreement" (id). The complaint alleges misrepresentations that are beyond the agreement that induced the plaintiff to enter the agreement. Therefore, there are no provisions of the agreement which create a bar to any claims for fraudulent misrepresentation.

Therefore, based on the foregoing the motion seeking summary judgement dismissing the fraudulent misrepresentation claim is denied.

So ordered.

ENTER:

DATED: May 30, 2024
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC